

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

SCOOTER G. MAHONEY,

Plaintiff,

-vs-

DELTA AIRLINES, INC., and AETNA
LIFE INSURANCE COMPANY,

Defendants.

NO. CV-09-0198-LRS

ORDER RE PLAINTIFF'S MOTION
TO COMPEL DISCOVERY
DEFENDANTS' MOTION FOR
PROTECTIVE ORDER

BEFORE THE COURT is Defendants' Motion For protective Order (Ct. Rec. 37) and Plaintiff's Motion to Compel Discovery (Ct. Rec. 41). A telephonic hearing was held January 27, 2011. Maris Baltins participated on behalf of the Plaintiff; Nancy Anderson participated on behalf of Defendants. The Court having considered the oral and written argument of counsel, enters this Order to memorialize and supplement the oral rulings of the Court.

I. BACKGROUND FACTS

Plaintiff Scooter G. Mahoney commenced employment with Delta Air Lines ("Delta") on June 3, 1968 as a Flight Attendant. As a Delta employee, Plaintiff was a participant in and beneficiary of a group insurance disability policy ("MLTD Plan") subject to the rules and Regulations of the Employee Retirement Income Security Act of 1974

1 ("ERISA). Under the MLTD Plan, Delta Air Lines was the Plan
2 Administrator, while Aetna Life Insurance Company ("Aetna") was
3 designated a fiduciary, whose responsibilities included determining
4 whether beneficiaries were eligible for benefits.

5 On or about June 29, 2004, Plaintiff was assaulted while on duty as
6 a Flight Attendant and suffered a debilitating injury which rendered her
7 unable to continue working as a Flight Attendant. Commencing January 14,
8 2005, Plaintiff received monthly benefits under the MLTD Plan of \$100,
9 the minimum amount, combined with Worker's Compensation payments of
10 \$1,802.67. On March 20, 2006, Jacqueline G. Barley, an Aetna claim
11 analyst, sent a letter to Plaintiff which provided that effective
12 December 1, 2005, Aetna would be paying MLTD benefits of \$1,200 per month
13 from December 1, 2005 through September 30, 2012, triggering a 6 month
14 elimination period under the MLTD Plan.

15 Upon completion of the elimination period, Plaintiff was subject to
16 a "reasonable occupation" standard under the MLTD Plan, under which her
17 continued eligibility to receive MLTD benefits depended on whether
18 she was able to continue work in any "reasonable occupation." On
19 February 22 and 23, 2006, Aetna had Plaintiff participate in a Functional
20 Capacity Evaluation which concluded that Plaintiff could accept
21 employment in a full-time position involving "Light-Medium" physical
22 demands. Aetna next contacted Concentra Integrated Services ("Concentra")
23 to conduct a labor market survey of positions within 50 miles of Spokane
24 which would satisfy the "reasonable occupation" eligibility standard of
25 the MLTD Plan. Aetna told Concentra to apply an hourly wage of \$8.30 in
26 identifying any "reasonable occupation." Using the \$8.30 hourly wage,

1 Concentra identified positions, including restaurant hostess, as
2 alternative occupations which Aetna used to satisfy the "reasonable
3 occupation" standard and deny MLTD benefits to Plaintiff.

4 On June 29, 2006, Barbara Musgrave, Aetna Disability Case Manger,
5 contacted Plaintiff and advised her that her eligibility to receive
6 further MLTD benefits was terminated, explaining that the hourly wage
7 rate of \$8.30, represented 60% of Plaintiff's "LTD benefits". However,
8 as a Flight Attendant, Plaintiff's rate of pay, including base and flight
9 pay, given her years of service at Delta, was allegedly \$60.31 per hour.

10 On March 15, 2010, Plaintiff's counsel served counsel for Delta and
11 Aetna with Plaintiff's First Set of Interrogatories and Requests for
12 Production, to which Answers and Responses were received on or about
13 April 26, 2010. Defendants refused to provide additional information
14 related to the actual hourly rate of pay Plaintiff was earning prior to
15 her disability and how an hourly rate of \$8.30 was obtained as a
16 "reasonable wage" amount.

17 **II. PLAINTIFF'S MOTION TO COMPEL**

18 Plaintiff argues that because Defendant Aetna is both the funding
19 source for benefits and fiduciary authorized to review claims for
20 benefits, Aetna "operates under what may be termed a structural conflict
21 of interest." *Abatie v. Alta Health & Life Insurance Co.*, 458 F.3d 955,
22 965 (9th Cir. 2006). Given this structural conflict of interest, the
23 Courts apply an abuse of discretion review which is "tempered by
24 skepticism commensurate with the plan administrator's conflict of
25 interest." *Id.* at 968. Plaintiff argues that in determining the weight
26 to be given the conflict of interest, the Court may consider evidence

1 outside the administrative record. Plaintiff specifically requests an
2 order compelling:

- 3 • Delta to respond to Plaintiff's Request for Production No. 2;
- 4 • Aetna to respond to Plaintiff's Request for Production No. 2 and to
5 answer Plaintiff's Interrogatory No. 2;
- 6 • Delta to have its Fed. R. Civ. P. 30(b)(6) representative appear at
7 a deposition as may be scheduled between the parties; and
- 8 • Aetna to have its Fed. R. Civ. P. 30(b)(6) representative appear at
9 a deposition as may be scheduled between the parties.

10 At the hearing, defense counsel indicated that the parties had
11 reached an agreement on producing some discovery that was apparently not
12 in the administrative record and Defendants would be answering the
13 interrogatory question(s) pertaining to the determination that \$8.30
14 hourly wage would be applicable in determining Plaintiff's reasonable
15 occupation standard. Defendants, however, opposed the request for Fed.
16 R. Civ. P. 30(b)(6) representative depositions, arguing that the
17 interrogatory answers should be sufficient.

18 Plaintiff argues that irregularities prevented a full development
19 of the administrative record in this case, i.e. that as a senior flight
20 attendant, Plaintiff did not necessarily work 40 hour weeks. Plaintiff
21 additionally asserts that she was never advised of any adverse
22 determination and never notified of her right to pursue any available
23 administrative remedies, including the right to appeal the adverse
24 decision. See Complaint, ¶3.14. Plaintiff additionally indicates that
25 she never received the July 3, 2006 letter from Aetna terminating her
26 MLTD benefits. *Id.* ¶3.16.

1 **III. ANALYSIS**

2 In the Ninth Circuit where an insurer has a conflict of interest
3 which arises out of serving in the dual roles as administrator and
4 funding source for the plan, judicial review of such a decision is still
5 for abuse of discretion, but is "less deferential." *Regula v. Delta*
6 *Family-Care Disability Survivorship Plan*, 266 F.3d 1130, 1145 (9th
7 Cir.2001). In the present case, the Court's task here is to determine
8 whether discovery should be allowed, and, if so, to tailor the scope of
9 that discovery. The Court finds that some information, regarding
10 Plaintiff's claims handling and decision making processes, is
11 discoverable under the circumstances of this particular case.

12 More specifically, and Defendants concede, the administrative record
13 should be further developed through production of documents, which refer
14 or relate to the calculation of \$8.30 per hour as a "reasonable wage" in
15 assessing whether Plaintiff could obtain a "reasonable occupation."
16 Additionally, limited discovery is permissible of documents which refer
17 or relate to Plaintiff's payroll records from 2001 through 2006. As to
18 Plaintiff's request to depose persons knowledgeable in the topics
19 including calculation of \$8.30 per hour as a "reasonable wage" and
20 employment/salary history, the Court finds that identification of such
21 persons and their role in arriving at the asserted reasonable wage at
22 this juncture is sufficient but would encourage agreement by the parties
23 to the taking of limited deposition testimony to create a record which
24 clearly shows how the decision was made and the reasons for the same.
25 In the absence of agreement concerning any requested deposition
26 testimony, the Court will assist by hearing the dispute, insofar as

possible, on shortened notice, pending further Court order. Accordingly,

IT IS ORDERED that:

1. Defendants' Motion for Protective Order, **Ct. Rec. 37**, is **DENIED without prejudice** in order to permit Plaintiff to obtain limited discovery. Defendants may renew their motion at a later time if necessary.

2. Plaintiff's Motion to Compel Discovery, **Ct. Rec. 41**, is **GRANTED in part and DENIED in part**. Defendants shall cooperate in the production of documents, which refer or relate to the calculation of \$8.30 per hour as a "reasonable wage" in assessing whether Plaintiff could obtain a "reasonable occupation" and documents which refer or relate to Plaintiff's payroll records from 2001 through 2006. Defendants shall also identify those persons who made the wage calculations and are capable of explaining the method of calculation and reasons for the wage rate which was utilized.

IT IS SO ORDERED.

The District Court Executive is directed to file this Order and provide copies to counsel.

DATED this 15th day of February, 2011.

s/Lonny R. Suko

LONNY R. SUKO
UNITED STATES DISTRICT JUDGE